

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2758

Cir. Ct. No. 2011CF1135

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK W. JAKUBIEC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Frank Jakubiec appeals a judgment convicting him of arson with intent to defraud as a party to a crime. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He contends his counsel was ineffective for three reasons:

(1) counsel failed to impeach Rae Mackin’s testimony that Jakubiec admitted setting the fire by introducing evidence that Mackin wanted Jakubiec to be sent to prison to gain advantage in a juvenile court proceeding regarding their three children; (2) counsel failed to impeach Tammi McGillivray’s testimony that Jakubiec admitted starting the fire by establishing she wanted Jakubiec to go to prison to avoid his accusing her of theft; and (3) counsel failed to call Jakubiec’s brother, Louis, to testify that he replaced a metal part of the halogen lamp that started the fire with a plastic piece, which would support Jakubiec’s claim that the fire was accidentally started.¹ We reject these arguments and affirm the judgment and order.

¶2 To establish ineffective assistance of counsel, Jakubiec must prove both deficient performance and prejudice to his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. *Id.* at 691. To establish prejudice, the defendant must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶3 Jakubiec failed to establish deficient performance or prejudice from his counsel’s failure to introduce evidence of the juvenile court proceeding in which his children with Mackin were adjudged in need of protection or services

¹ In his reply brief, Jakubiec also contends his counsel was deficient for failing to have an arson expert testify at trial that the fire was an accident. We decline to consider an issue raised for the first time in a reply brief. *See State v. Lewandowski*, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

(CHIPS). The admissibility of that evidence was considered in a motion in limine. After concluding counsel could inquire whether Jakubiec was physically assaultive to Mackin and whether she was still angry about that, the court said, “But I’m not going to allow anything about the children placed in CHIPS or anything like that at this point.” The court based the decision on relevancy grounds because many factors come into play in CHIPS proceedings that would have to be explained to the jury, and the prejudice would outweigh its relevancy and mislead the jury. Our review of the record discloses no reason, and Jakubiec presents no reason, to believe the court would have allowed the CHIPS testimony if counsel had further tested the issue. At the postconviction hearing, the court stated it would not have allowed that line of questions. Counsel’s failure to raise a non-meritorious issue is not deficient performance. *See State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). Jakubiec also fails to establish prejudice because he provides no reason to believe the result of the proceeding would have been different if his counsel had attempted to introduce the CHIPS evidence despite the circuit court’s relevancy determination.

¶4 Jakubiec fails to establish deficient performance from his counsel’s failure to impeach McGillivray’s testimony by establishing she feared that Jakubiec would accuse her of theft of his personal property. At the postconviction hearing, Darrell McGillivray, Tammi’s ex-husband, testified Tammi was concerned because of a dispute between her and Jakubiec over some personal property and she hoped Jakubiec would be sent back to prison. Darrell denied Tammi was concerned over a lawsuit, stating she was more worried about Jakubiec coming over to the house. Jakubiec’s trial attorney testified at the postconviction hearing that he did not think Jakubiec told him about Darrell’s potential testimony, and Jakubiec agreed he had not told his attorney about

Darrell. Counsel is not deficient for failing to discover information that was available to his client that the client failed to share with counsel. *State v. Nielsen*, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

¶5 For the same reason, Jakubiec’s claim of deficient performance fails regarding his counsel’s failure to call Louis Jakubiec to testify about replacing metal parts of the halogen lamp with plastic. Trial counsel testified he did not think Jakubiec told him about Louis’s modification of the lamp. Frank Jakubiec testified he mentioned the plastic pole to his trial counsel, but the circuit court did not find that testimony credible because it did not believe Frank knew of the modification at the time of trial. The circuit court, not this court, determines the credibility of witnesses. *State v. Ortiz-Mondragon*, 2015 WI 73, ¶30, 364 Wis. 2d 1, 866 N.W.2d 717.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

